

LORENZO PASILLAS, AMELIA)
PASILLAS,)
)
Plaintiffs,)
v.)
)
DEUTSCHE BANK NATIONAL TRUST)
COMPANY, *et al.*,)
)
Defendants.)
)

Case No.: 12-CV-04123-LHK

ORDER GRANTING MOTIONS TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT

¹ Duque moves, in the alternative, for a more definitive statement under Federal Rule of Civil Procedure 12(e). ECF No. 48. Because the Court GRANTS Duque's Motion to Dismiss for failure to state a claim, the Court DENIES as moot Duque's Rule 12(e) argument.

Malone, and Tianna Alvarado (collectively, “Aztec Defendants”). ECF Nos. 49, 75. Plaintiffs failed to timely oppose either the Deutsche Bank Defendants’ or Duque’s Motions; however, they did file a timely Opposition to the Aztec Defendants’ Motion, ECF No. 60. Both Duque and the Aztec Defendants replied. ECF Nos. 62, 63. Pursuant to Civil Local Rule 7–1(b), the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the Hearings on these Motions scheduled for September 19, 2013, and December 12, 2013. The Court continues the September 19, 2013 Case Management Conference to January 8, 2014, at 2:00 p.m. Having considered the submissions of the parties and the relevant law, and for good cause shown, the Court hereby GRANTS Defendants’² Motions to Dismiss without prejudice.

I. BACKGROUND

A. Factual Allegations

This case arises out of a mortgage Plaintiffs obtained in 2002 in order to purchase a farm in Hollister, California. *See* FAC ¶¶ 19, 22, 25. On March 13, 2009, Plaintiffs received a notice that they were in default on this mortgage based on a failure to make payments beginning on December 1, 2008. FAC ¶¶ 29-30. Plaintiffs claim that this notice was erroneous, because they had, in fact, made timely payments at least through the end of 2008. FAC ¶ 32 (chart displaying payments made by Plaintiffs in 2008). Notwithstanding the error in the notice, Plaintiffs allege that Defendants proceeded to foreclose on Plaintiffs’ farm, and that the property was sold to Deutsche Bank, the beneficiary on the deed of trust, at auction on October 30, 2009. FAC ¶¶ 31, 80. Although Plaintiffs acknowledge elsewhere in the FAC that they eventually did fall behind on their mortgage payments, *see* FAC ¶ 64 (“On or about February 2009, Plaintiffs fell behind in their payments . . .”), and that they ceased making payments entirely while attempting to negotiate a loan modification, *see* FAC ¶¶ 69-70, they nevertheless allege that the incorrect notice of default was a proximate cause of their losing their home to foreclosure. *See* FAC ¶¶ 32-39.

Plaintiffs allege that there were other irregularities in the foreclosure process on their home, including failure to properly comply with the procedures for nonjudicial foreclosure, FAC ¶¶ 47-

² Although Defendants are distinct individuals and entities who have filed separate motions to dismiss, it is rarely necessary to distinguish among them. Accordingly, the Court refers to them collectively as “Defendants” unless circumstances require otherwise.

62, and improper transfer of the deed of trust from the original loan company to Deutsche Bank, FAC ¶¶ 114-150. Plaintiffs also bring a claim against Duque for alleged wrongdoing in connection with Plaintiffs' efforts to obtain a loan modification. FAC ¶¶ 63-83. As relief for Defendants' various purported misdeeds, Plaintiffs ask the Court to set aside the sale of their farm and also request damages, attorney's fees, and costs. FAC at 26.

B. Procedural History

Plaintiffs filed their Original Complaint on August 6, 2012. ECF No. 1. Defendants filed a Motion to Dismiss the Original Complaint on October 24, 2012. ECF No. 15. Plaintiffs did not respond to Defendants' Motion, but instead filed the FAC on April 11, 2013. ECF No. 27. In light of Plaintiffs having filed the FAC, Defendants withdrew their Original Motion to Dismiss. ECF No. 38.

The Deutsche Bank Defendants filed a Motion to Dismiss the FAC on May 15, 2013. ECF No. 36. Plaintiffs did not respond to this Motion. Defendant Duque filed a separate Motion to Dismiss the FAC on June 11, 2013. ECF No. 48. Plaintiffs did not file their response to this Motion until July 10, 2013, well past the 14-day deadline imposed by Civil Local Rule 7-3(a). ECF No. 59.³ Duque filed a Reply, in which he objected to the filing of an untimely Opposition, on July 17, 2013. ECF No. 63.

Aztec filed its Motion to Dismiss the FAC on June 26, 2013. ECF No. 49.⁴ Plaintiffs filed an Opposition, this one timely, on July 10, 2013. ECF No. 60. Aztec filed a Reply on July 17,

³ Plaintiffs did not seek leave to file an untimely Opposition, nor do they otherwise identify any good cause for the delay. Accordingly, the Court will not consider Plaintiffs' Opposition to Duque's Motion to Dismiss.

⁴ The parties have filed an assortment of Requests for Judicial Notice in conjunction with their briefs. *See* ECF No. 37 (Deutsche Bank Defendants' Request for Judicial Notice in connection with their Motion to Dismiss the FAC); ECF No. 50 (Aztec Defendants' Request for Judicial Notice in Connection with their Motion to Dismiss the FAC); ECF Nos. 77, 78 (Plaintiffs' Requests for Judicial Notice in connection their Oppositions to the Motions to Dismiss). These Requests ask the Court to take judicial notice of a variety of public documents related to Plaintiffs' loan, as well as to related filings in other courts. None of these Requests is opposed.

A matter may be judicially noticed if it is either "generally known within the territorial jurisdiction of the trial court" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The documents for which the parties request judicial notice are all matters of public record, and the Court finds that they are not subject to reasonable dispute and are proper subjects of judicial notice. Accordingly, the Court GRANTS all parties' Requests for Judicial Notice, though it notes that none of the judicially noticed documents are ultimately relevant to its conclusions in this Order.

2013. ECF No. 62. On August 15, 2013, Defendants Alvarado, Malone, and Weaver—who had only just been served in the case—filed a “Notice of Joinder” in Aztec’s Motion to Dismiss. ECF No. 75. Plaintiffs filed a Response to the Notice of Joinder, ECF No. 76, to which the Aztec Defendants replied. ECF No. 80.⁵

II. LEGAL STANDARDS

A. Motion to Dismiss Under Rule 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). The Supreme Court has held that Rule 8(a) requires a plaintiff to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, a court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

However, a court need not accept as true allegations contradicted by judicially noticeable facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and the “[C]ourt may look beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)

⁵ Plaintiffs’ Response to the Notice of Joinder does not object to the joinder *per se*, but rather reiterates arguments made in Plaintiffs’ Opposition to Aztec’s Motion to Dismiss. *See* ECF No. 76. The Response adds some new arguments as well. *See id.* The Aztec Defendants ask the Court to strike this Response, arguing that it is an improper attempt to file a second brief in opposition to Aztec’s Motion to Dismiss. *See* ECF No. 80 at 2. The Court agrees with the Aztec Defendants that Plaintiffs’ Response to the Notice of Joinder is a thinly veiled attempt to have an unauthorized second bite at responding to the Aztec Defendants’ Motion to Dismiss, and disregards the Response accordingly. The Court notes that even if it were to consider the Response, nothing contained therein would persuade the Court to reach a different conclusion regarding the various Motions to Dismiss.

1 motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).
 2 Nor is the court required to “assume the truth of legal conclusions merely because they are cast in
 3 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
 4 curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere “conclusory
 5 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.”
 6 *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678.
 7 Furthermore, “a plaintiff may plead herself out of court” if she “plead[s] facts which establish that
 8 [s]he cannot prevail on h[er] . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.
 9 1997) (internal quotation marks omitted).

10 **B. Leave to Amend**

11 If the Court determines that the complaint should be dismissed, it must then decide whether
 12 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend
 13 “should be freely granted when justice so requires,” bearing in mind that “the underlying purpose
 14 of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or
 15 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation
 16 marks omitted). Nonetheless, a court “may exercise its discretion to deny leave to amend due to
 17 ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure
 18 deficiencies by amendments previously allowed, undue prejudice to the opposing party. . . , [and]
 19 futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir.
 20 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

21 **III. DISCUSSION**

22 Although Defendants identify numerous deficiencies in Plaintiffs’ FAC, the Court need
 23 address only one. Plaintiffs’ RESPA claim is the only federal claim in this lawsuit, and, for the
 24 reasons that follow, the Court concludes that Plaintiffs fail to state a claim for violation of this
 25 statute. Having reached this conclusion, the Court declines to exercise supplemental jurisdiction
 26 over Plaintiffs’ remaining state-law claims.

1 **A. RESPA**

2 Under RESPA, a loan servicer has a duty to respond to a borrower's "qualified written
3 request" ("QWR") for "information relating to the servicing of [his] loan." 12 U.S.C.
4 § 2605(e)(1)(A). Plaintiffs allege that Defendants violated Section 2605(e) by: (a) "failing to
5 provide a written response acknowledging receipt of the Plaintiff[s'] [QWR] no later than 20 days
6 after receipt of the request," FAC ¶ 170;⁶ (b) "failing to make appropriate corrections to the
7 Plaintiff[s'] account in response to the [QWR], including the crediting of any late charges or
8 penalties, and failing to transmit written notice of such corrections to the Plaintiff[s] no later than
9 60 days after receipt of the Plaintiff[s'] [QWR]," FAC ¶ 171; (c) "failing to provide the Plaintiff[s]
10 with the information and documentation requested, or an explanation why the information sought
11 was unavailable, no later than 60 days after receipt of the Plaintiff[s'] [QWR]," FAC ¶ 173; (d)
12 "refusing to cease [] collection efforts and foreclosure proceedings after receiving the Plaintiff[s']
13 [QWR]," FAC ¶ 174; and (e) "providing information to consumer reporting agencies regarding
14 overdue payments allegedly owed by the Plaintiff[s] that were related to [their] [QWR]," FAC
15 ¶ 175. Plaintiffs further allege that Defendants have "engaged in a pattern or practice of non-
16 compliance" with RESPA, FAC ¶ 176, though they provide no further specifics concerning this
17 allegation.

18 Plaintiffs' RESPA allegations fail for multiple reasons. Initially, the Court notes that
19 Section 2605(e) appears to impose duties on loan servicers only. *See, e.g.*, 12 U.S.C. § 2605(e)
20 ("Duty of loan servicer to respond to borrower inquiries"); § 2605(e)(2) (within a certain number
21 of days of receiving a QWR, "the servicer shall" undertake certain actions). Ocwen is the only loan
22 servicer identified in this case, however, and the FAC fails to explain how or why the remaining,
23 non-loan servicer Defendants can be held liable for violations of 12 U.S.C. § 2605(e).

24 In addition, while the FAC alleges that Ocwen's response to Plaintiffs' QWR was untimely,
25 *see* FAC ¶¶ 170, 173, the FAC nowhere states *when* Plaintiffs sent the QWR. Without this

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27 ⁶ RESPA was amended, effective July 20, 2011, to shorten the time afforded loan servicers to
28 respond to QWRs. Pub. L. No. 111-203, tit. XIV, § 1463 (2010). Plaintiffs' allegations date from
2009, prior to these amendments. Consequently, the 20- and 60-day deadlines identified in the
FAC apply in this case.

1 allegation, the Court finds that Plaintiffs have not stated a claim for violation of Section 2605(e)'s
2 timing provisions that is "plausible on its face." *Iqbal*, 556 U.S. at 678.

3 Furthermore, the FAC fails to allege damages with even the remotest degree of specificity.
4 Courts routinely hold that a claim based on a loan servicer's failure to respond to a QWR must
5 allege actual damages, *see, e.g., Williams v. Wells Fargo Bank, N.A., Inc.*, No. 10-399, 2010 WL
6 4695480, at *3 (N.D. Cal. Apr. 13, 2010) (citing cases), as well as a causal relationship between
7 the alleged damages and the RESPA violation, *see, e.g., Schneider v. Bank of America N.A.*, No.
8 11-2953, 2013 WL 1281902, at *7 (E.D. Cal. Mar. 26, 2013) (citing cases). Here, however, the
9 FAC alleges only that "[a]s a result of defendant's violation, plaintiff[s] [are] entitled to damages,
10 attorney's fees and costs." FAC ¶ 177. This bare, conclusory allegation is insufficient to survive a
11 motion to dismiss, particularly where, as here, other allegations in the FAC suggest that the
12 damages Plaintiffs suffered—foreclosure, reduced credit rating, etc.—may well have been caused
13 by Plaintiffs' failure to pay their mortgage, rather than by Ocwen's failure to properly respond to
14 their QWR. *See, e.g.,* FAC ¶ 32 (listing mortgage payments up to, but not after, December 29,
15 2008); ¶ 64 ("On or about February 2009, Plaintiffs fell behind in their [mortgage] payments. . . .");
16 *see also, e.g., Singh v. Wash. Mut. Bank*, No. 09-2771, 2009 WL 2588885, at *5 (N.D. Cal. Aug.
17 19, 2009) (dismissing a similar RESPA claim for failure to adequately allege damages when sole
18 allegation concerning damages was that the defendants "are liable for actual damages, costs, and
19 attorney fees" (internal quotation marks omitted)).

20 Finally, the Court notes that Plaintiffs' RESPA claim is generally vague and is really little
21 more than a "formulaic recitation[s] of the elements of a cause of action." *Iqbal*, 556 U.S. at 678
22 (internal quotation marks omitted). Should Plaintiffs elect to replead their RESPA claim in an
23 amended complaint, they would be well-advised to be more specific in explaining their allegations.

24 Given the numerous deficiencies in Plaintiffs' RESPA claim, the Court DISMISSES this
25 claim as to all Defendants. Because Plaintiffs may be able to plead this claim with greater
26 specificity, however, this dismissal is without prejudice.

B. Supplemental Jurisdiction

Because the parties are non-diverse, *see* FAC ¶¶ 4-5 (stating that both Plaintiffs and Deutsche Bank are citizens of California), the now-dismissed RESPA claim provides the sole basis for federal subject matter jurisdiction in this case. While a federal court may exercise supplemental jurisdiction over state-law claims “that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution,” 28 U.S.C. § 1367(a), a court may decline to exercise supplemental jurisdiction where it “has dismissed all claims over which it has original jurisdiction,” 28 U.S.C. § 1367(c)(3); *see also Albingia Versicherungs A.G. v. Schenker Int’l, Inc.*, 344 F.3d 931, 937–38 (9th Cir. 2003) (Section 1367(c) grants federal courts the discretion to dismiss state-law claims when all federal claims have been dismissed). A court, in considering whether to retain supplemental jurisdiction, should consider factors such as “economy, convenience, fairness, and comity,” *Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc) (internal quotation marks omitted); however, “in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state[-]law claims.” *Exec. Software N. Am., Inc. v. U.S. Dist. Court*, 24 F.3d 1545, 1553 n.4 (9th Cir. 1994) (emphasis omitted), *overruled on other grounds by Cal. Dep’t of Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).

The balance of factors in this case points in favor of dismissing Plaintiffs’ remaining state-law claims. This case has yet to proceed beyond the pleadings and there has been no discovery conducted to date. Few judicial resources are wasted by dismissing the case at this stage, and dismissal promotes comity by allowing the California courts to interpret state law in the first instance. Accordingly, the Court declines to exercise supplemental jurisdiction over the remaining state-law causes of action in the FAC.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants’ Motions to Dismiss the FAC without prejudice. Should Plaintiffs elect to file a Second Amended Complaint curing the deficiencies discussed herein, they shall do so within 21 days of the date of this Order. Failure to

1 meet the 21-day deadline to file an amended complaint or failure to cure the deficiencies identified
2 in this Order will result in a dismissal with prejudice. Plaintiffs may not add new causes of action
3 or parties without leave of the Court or stipulation of the parties pursuant to Federal Rule of Civil
4 Procedure 15.

5 **IT IS SO ORDERED.**

6
7 Dated: September 17, 2013



LUCY H. KOH
United States District Judge

United States District Court
For the Northern District of California